

# ***DESIGNING CULTURALLY CONSCIOUS ALTERNATIVE DISPUTE RESOLUTION TO FOSTER ASIAN ECONOMIC DEVELOPMENT\****

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## ***Abstract***

*Creating an Asian model of alternative dispute resolution which considers Asian cultures is important. A mere adoption of western standard will less likely accommodate Asian's unique way of handling disputes. Culture-related problems can be avoided if international commercial mediation or arbitration is tuned in to cultural needs and expectations.*

## ***Abstrak***

*Penyusunan model alternatif penyelesaian sengketa gaya Asia yang mengakomodasi budaya setempat penting untuk dilakukan. Penerapan standar barat tidak selamanya cocok dengan cara unik orang Asia dalam memandang suatu sengketa. Konflik kultural dapat dihindari apabila mediasi atau arbitrase bisnis internasional disesuaikan dengan kebutuhan budaya setempat.*

***Keywords:*** culture, ADR, economic development.

## **A. Introduction**

Evolution of market-oriented economy and the increasing cross-border commercial activities has brought an urgent need for Asian countries to tighten their cooperation in dealing with commercial disputes. A business relationship may end with conflict, no matter how hard the parties have tried to avoid it. When disputes arise, the problem of resolution becomes an issue. This is a complex issue since the contracting parties come from various countries which have different legal systems.

As every country applies its own legal system which differs from others, it will be difficult to determine which legal system

will be applied. This is for example, when an Indonesian businessman has business relationship with a Korean businessman. In the middle of the contract, a dispute arises. To resolve the dispute, there are some legal issues to be decided, such as: what kind of dispute resolution method shall be applicable, where to resolve the dispute whether in Indonesia or Korea, and how the decision will be enforced. It is highly likely that the Indonesian party will choose Indonesia as the place and Indonesian law as the applicable law to resolve the dispute. This will be also the case for the Korean party. This is because they know exactly how the law in their country works to protect

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their interests.

As a method of resolving dispute, court litigation involves complexity of court proceedings which is not suitable with business needs. Complex procedure to resolve dispute might slow down the resolution process. It has further effect which is the more time needed to resolve dispute, the more money the party will spend. Moreover, foreign court judgments are not always applicable in some countries such as Indonesia. From the example stated above, in case the dispute resolved in Korean court and the Korean party wins the case, the court decision cannot be enforced in Indonesia as Indonesian courts do not recognize foreign judgment.

Moreover, the adversarial nature of litigation might escalate tension between the contracting parties. This is due to the fact that in litigation, each party will seek another party's mistake to attack them and to convince the judge so the judge will stand in their position. As a result, after the dispute resolved, the relationship between the parties might end up and they might not willing to create further commercial activities together. Because of these problems, it is widely believed that litigation is not the best way to resolve commercial disputes, especially those which involve foreign parties.

Alternative Dispute Resolution (ADR) which consists of negotiation, mediation, conciliation and arbitration has long been known as a better way to resolve international commercial disputes than litigation. Asians have a legal tradition of resolving commercial disputes through consensus-based processes which is based on negotiation and mediation. Not only does

negotiation and mediation provide a speedy, simple and affordable resolution process, but also it is in accordance with Asian spirit to keep harmony in the society. This is because negotiation and mediation promotes a mutual cooperation and understanding in resolving disputes.

Recently, there is a movement to use "international ADR system," an ADR system which highly adheres to international model. This is for example in mediation and arbitration. Some Asian countries setting out mediation as well as arbitral institution such as: the Hong Kong Mediation Council, the Indonesian Mediation Centre, the China International Economic and Trade Arbitration Commission, Hong Kong International Arbitration Centre, Japan Commercial Arbitration Association, the Kuala Lumpur Regional Centre for Arbitration, Indonesian Arbitration Centre and the Singapore International Arbitration Centre and others.

However, in general Asia is not a favorite place for settling disputes through ADR. There are only two countries in Asia which are well known for their outstanding reputation in resolving international commercial disputes namely: Singapore and Hong Kong. Their mediation and arbitration centre have widely been trusted among business people around the world. Despite of the availability of skilled and experienced dispute resolution practitioners, the good reputation of Singapore and Hong Kong ADR system is because of support from the government and the court.

In order to develop a strong economy and encourage foreign investment, not only does Asian ADR system need to be modernized but also they need to be made

culturally conscious. Modernizing ADR system undoubtedly will increase security on foreign investors doing business in Asia, while culturally conscious ADR will benefit Asian parties. Good dispute settlement mechanism put both parties need equally. Therefore, every party involved in the dispute will be sure that they are treated fairly and their legal rights will be properly protected.

This paper argues that merely using international approach of ADR will less likely to benefit Asian countries. Rather, in order to optimally reach settlement and maintain business relationship, ADR system should also adhere to Asian cultures. The primary aim of this paper is to design an Asian model of ADR mechanism which pays respect to Asian cultures as well as meet foreign investors' need of security. Furthermore, it studies what Asian countries' government, ADR institution and legal scholars have done to promote the use of ADR in Asia to resolve international commercial dispute.

### **B. How Asian See Dispute**

Each country usually creates dispute resolution institutions which reflect their own cultural beliefs and norms. Therefore, for foreign investors, it is important to take into account the cultural context in which their businesses operate. For Asians, the cultural differences with Western perspective regarding dispute settlement raise serious issues. It is often the case that

misunderstanding between Asian parties and their foreign business counterpart cause the business relationship broken irreparable.

Even though each Asian country has its own culture, in general they have similarity in which they prefer to avoid conflict. Confucianism which is the foundation for Chinese, Korean, Hong Kong, Singapore and Japanese attitudes and values does not like the idea of battle in court because they are pursuing a settlement and keep harmony in the same time.<sup>1</sup> Other Asian countries are close to the Confucianism since they also promote mutual understanding and pursuing a settlement based on consensus. This can be seen in Indonesia and Malaysia. These countries local culture recognize a form *musyawarah* which is a consensually based conflict management procedure. This system of decision making and dispute resolution occurred within many villages and institutions.<sup>2</sup>

In India, ADR has also long been applied in the society. Many Hindu villages use a justice system known as *panchayat* that consists of a five-member panel that mediates and arbitrates disputes involving welfare and grievances within the community. Nepal, Pakistan, and Bangladesh also still use the *panchayat* tradition. The Nepalese have also implemented their own mediation process to address forest management disputes, marital conflicts, and financial transactions. On the other hand, for Pakistan and Bangladesh, they have focused

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<sup>1</sup> Shin-yi Peng, "The WTO Legalistic Approach and East Asia: from the Legal Culture", *Asia Pacific Law and Policy Journal*, 13 June 2000.

<sup>2</sup> Cheri M Ganeles, 2002, "Cybermediation: A New Twist on an Old Concept", *12 Albany Law Journal of Science and Technology* 715.

their mediation programs on family and civil disputes.<sup>3</sup>

The legal traditions in those Asian countries are entirely different from the Western ideal of the rule of law. Westerners tend to be much more litigious and claims-conscious when they deal with commercial disputes. Moreover, they are also comfortable with the notion of a strong legal system therefore they view a legalistic approach as an effective way to settle disputes in international trade.<sup>4</sup> The adversarial system of dispute settlement therefore is a common method to be used.

Unlike the Westerners, for Asians, law basically did not even pertain to the private sphere of commerce, which remained the affair of the parties involved.<sup>5</sup> Therefore, in dealing with commercial disputes, they tend to pursue a voluntary and consultative dispute resolution mechanism that is based on harmony, flexibility and mutual benefits.<sup>6</sup> These features reflect Asian traditional values.

For Asians, a declaration of an intention to use court litigation to resolve a dispute is considered a declaration of war.<sup>7</sup> Using court litigation as a mean to resolve business dispute will be regarded as an attempt to break the business relationship. In Asian perspective, a party who goes to court to have their disputes resolved is not seeking

a settlement but merely seeking a right. It is believed that using ADR instead of court litigation is useful in order to develop strong business ties with Asian business partners. This is different from Western philosophy which tends to use court litigation which emphasizes justice and truth, rather than harmony.

### C. What is Alternative Dispute Resolution?

The term of Alternative Dispute Resolution or ADR is often used to describe a wide variety of dispute resolution mechanism that is alternative to court processes. ADR mechanism is designed to reduce or minimize tension between disputing parties while their disputes being settled. Moreover, ADR is also intended to facilitate community development where community members can use two way communications to settle their disputes. ADR system is generally categorized as negotiation, conciliation, mediation, and arbitration systems.

ADR system is designed to meet a wide variety of different objectives. Some of these goals are directly related to improving the administration of justice and the settlement of particular disputes. This is for example to create cheaper and speedy dispute resolution process. This is in order to make the system more affordable and more reliable.

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<sup>3</sup> Kimberly A Klock, "Resolution of Domestic Disputes through Extra-Judicial Mechanisms in The United States and Asia: Neighborhood Justice Centers, the *Panchayat* and the *Mahalla*", *15 Temple International and Comparative Law Journal* 275, 2001.

<sup>4</sup> Shin-yi Peng, *Loc. Cit.*

<sup>5</sup> Philip Jc Macghounny, "Rethinking the Role of Law and Contracts in East-West Commercial Relationship", *Virginia Journal of International Law*, 41, 2001.

<sup>6</sup> Shin-yi Peng, *Loc. Cit.*

<sup>7</sup> Amanda Stallard, "Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution", *Ohio State Journal on Dispute Resolution* 2002.

Therefore, the availability of ADR system aims to reduce the costs of handling disputes and to produce more satisfying and durable resolutions. It is important to design such a system which creates an interest-oriented system.

Some other objectives are related to other development objectives, such as economic restructuring, or the management of tensions and conflicts in communities. Efficient dispute resolution procedures are critical to economic development objectives where court delays or corruption occurred in court restrain foreign investment and economic restructuring activities.

### **1. Types of Alternative Dispute Resolution in Asia**

Some people view that Asian and Western commercial dispute resolution are the same in which they aim in achieving “expectation interest” of the disputing parties. This means that they heavily focus on predictability of the outcome of the case. However, there is a distinction in term of what to be constituted as predictability. For Asian, predictability means that there will be a conclusion to the dispute. The conclusion will usually provide a basis for continuing the business relationship. For Westerners, predictability means legally correct outcomes favored to the winning party, regardless the future relationship of the both parties.

Because of that distinction, Asian dispute resolution techniques and procedures are different from those of Westerners. Mediation, negotiation and conciliation, for example, traditionally have been

preferred strongly over arbitration or other compulsory adjudication for the resolution of commercial disputes for Asians. This is because they are more likely, if successful, to provide a basis on which to continue the commercial relationship.<sup>8</sup> However, in order to meet international demands arbitration is now well recognized to settle dispute in Asia.

Nowadays, generally, four kinds of alternative dispute resolution are available in Asia: negotiation, mediation, conciliation and arbitration. Each of these dispute resolution procedures can be carried out with the assistance of programs or systems maintained by governmental bodies or independent associations.

#### **a. Negotiation**

Negotiation is an out of court dispute settlement where the disputants or their representative meet and communicate together to resolve their dispute without the intervention of a third party. A negotiation method creates a structure to encourage and facilitate communication between parties. If the negotiation succeeds, the result is called agreement. Both of the parties are morally bound by the agreement.

#### **b. Conciliation**

Conciliation is basically a type of dispute resolution where two disputant parties involve a third party as a conciliator. The conciliator serves as a facilitator and advisor to resolve the dispute. The conciliator can make suggestions for settlement terms and can give advice on the subject matters. Conciliator can use their roles to encourage the parties to reach agreement. Sometimes,

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<sup>8</sup> Philip Jc Macghounny, *Loc. Cit.*

if necessary, conciliator is also required to provide legal information. This is beneficial to make the agreement reached comply with the rules and legal system. Court-annexed conciliation is an out of court dispute settlement to be initiated by petition of a party or referral by a judge who handle a litigation case.

### **c. Mediation**

Mediation has been defined as “the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision making power but who assist the involved parties in voluntary reaching a mutually acceptable settlement of issues in dispute.” Mediation aims to solve a dispute concerning civil affairs through mutual concession between parties under a simple procedure.

The role of the third party (mediator) is only as a facilitator who helps both of the disputants to communicate each other and help the parties to reach agreement. There are two kinds of mediation: independent and court based mediation programs addressing family and civil disputes. Apart of voluntary mediation by parties’ agreement, Asia also recognizes court-annexed mediation in which the court intervenes and leads the mediation process. However, there are two most distinguishing characters of Asia’s mediation procedure which are court’s involvement in the mediation process and the nature of the mediation agreement. Usually in mediation procedure, the court does not intervene in the mediation process. However, sometimes in civil mediation procedure, the court intervenes in the process. Moreover, it plays a leading role.

The second distinction is the role of

mediator. It is commonly believed that in mediator proceedings, it is the parties themselves who have to reach agreements. However, in Asia a mediator has authority to make decision whenever the parties cannot reach an agreement. Moreover, mediator also has authority to review the agreement, and in case they find that the agreement is unreasonable the mediator shall either terminate the mediation proceeding, treating the case as having reached no agreement or make decision in lieu of an agreement.

It can be said that Asian mediation system is a combination between mediation and arbitration (med-arb). This is because when the parties do not reach an agreement, the mediator shall make a decision in lieu of an agreement, although the decision is not binding on the parties. This task is similar to that of arbitrator.

### **d. Arbitration**

Arbitration is a procedure where disputes are settled through the decision of an arbitrator or panel of arbitrators who have been chosen by the parties by a written agreement which is called an arbitration clause. An arbitration clause allows contracting parties to control the arbitral forum, arbitrators, procedures, and applicable law. Once the parties have entered into a written agreement to arbitrate, they no longer have rights to seek settlement in the courts, and the courts is required to refuse to settle the dispute except in very limited situations stated in national law.

Even though arbitration is less preferable compare to other ADR methods, it has been growing in the last decade. Arbitral institutions have been established across Asia such as KCAB (Korean Commercial

Arbitration Board), BANI (Badan Arbitrase Nasional Indonesia: Indonesian Arbitration Institution), JCAA (Japanese Arbitration Association) and others.

Using arbitration is beneficial because it provides a binding decision, the same effective results as court's decision, but without the formalities as needed in court proceedings. Moreover, delay and costs can be minimized as the parties may determine when the arbitrator has to render decision. In addition, unlike in trial where the judge take full controls over the litigation process, the parties in arbitration are independent from such judicial formalities where the parties may select their own place of arbitration, the arbitrators and even arrange the arbitration proceedings to their own specific needs.

Disputes fields which can be settled through arbitration are generally as follows: trade, joint investment, construction, advertising transportation, maritime, real property employment, intellectual property, and insurance. The time frame to render decision in arbitration is relatively shorter compare to that of court litigation. In Korea, domestic arbitration usually takes around four months to conclude, while international arbitration usually takes five months to complete.<sup>9</sup> As a comparison, court dispute settlement generally needs two to three years to complete. Moreover, opportunity to challenge the court decision through appeal is still available. As a result, the time needed to have the decision enforced will be longer

and more complicated. It is evident that settling dispute through arbitration is not only much faster, but also simpler compare to that of litigation.

## **2. Problem Faced by ADR in Asia**

It is undoubted that great inequalities between Asian countries and Western Countries may lead to imbalance position when dealing with disputes. Asian countries, which mostly consist of developing countries, are inherently at a disadvantage compare to their counterparts in the developed world. Commercial organizations and corporate entities in developed countries are differently capable in terms of their financial and experience. ADR procedures must treat both parties to any dispute as equal. However, the fact is Asian countries and Western countries are unequal. This is the reason why in the globalization era, it would be essential for commercial dispute practitioners to take national socio-economic characteristic into account while dealing with disputes.<sup>10</sup>

In many Asian countries dispute settlement and enforcement of arbitral awards still remain a grave cause for concern for foreign investors. This is for example China, Indonesia, Thailand and Vietnam. Vietnam has attempted to develop a system of dispute resolution where very little existed a decade ago. It remains disturbing for foreign investors that any form of enforcement under Vietnamese laws is uncertain and may be unlikely to occur in practice.<sup>11</sup>

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<sup>9</sup> Maniruzzaman AFM, 2003, "The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward", *6 International Energy Law & Taxation Review* 193-202.

<sup>10</sup> *Ibid.*

<sup>11</sup> Gillian Triggs, "Is There an Asian Style of Dispute Resolution?", *3 Melbourne University Law Review* 550, 1999.

In China, enforcement of arbitral awards remains one of the most difficult and uncertain aspects. In some instances, arbitral awards are denied enforcement because local courts come under significant pressure from local government authorities. Other times, even if enforcement is not expressly denied, the practical effect is the same because the Court fails to actively enforce the award. Even when the Courts issue orders requiring enforcement of arbitral awards, such orders are only pieces of paper that are dependent for execution on the often-elusive cooperation of local officials.<sup>12</sup>

Excessive court involvement also becomes a problem in Indonesia. This may be caused by various factors such as local protectionism, corruption and manipulation by the local disputing party, the non-cooperation tendency, inability of local courts to appreciate the ethos of international private dispute settlement, sometimes their inefficiency in handling matters, and serious lack of understanding of international arbitration rules and conventions including the New York Convention.<sup>13</sup>

Thailand's present rules governing arbitration state that the broad reviewability of arbitral awards by Thai courts becomes a serious problem. This is because such policy returns the dispute to court, a forum sought to be avoided. This makes no use of the purpose of using a choice of law provision to remove the dispute from the uncertain applications of national law and policy. As a result, the dispute will be examined by Thai court using Thai laws.

Moreover, Thailand's arbitration regime prohibits any aliens' participation in the arbitration process. International arbitration is highly attractive to foreign investors because of the global uniformity of its procedures and the ability to select their own lawyers to litigate on their behalf anywhere in the world. The inability of foreign lawyers to participate in the arbitration process removes this attractive feature. Therefore, the decision to arbitrate in Thailand cannot be automatic. It requires a foreign investor to specifically assess the value of the various factors and weigh the potential benefits against the risks.<sup>14</sup>

In court-annexed mediation, usually the principal mediator is judge. Judges may serve as a mediator for cases they handled in court using a format similar to a judicial settlement conference. They may also appoint a three-person mediation committee (composed of two neutral non-judge commissioners with special subject matter expertise and a judge who chairs); however, they will supervise the case carefully either way.

The fact that judges serve as the principal mediator raises a number of issues. First, a judge is not suitable as a mediator because the original duty of a judge is not to mediate but to decide a case by applying the law to the facts. The role of mediator is similar to that of a facilitator and a negotiator. During the process of the mediation process the role of mediator changes, he or she is a supervisor, teacher, clarifier, advocate, catalyst, and translator. Second, judges in Asia have few opportunities to learn or to

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<sup>12</sup> Maniruzzaman AFM, *Loc. Cit.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



be trained in mediator's roles and skills. The position of the mediation commissioner is inferior. This is because the standard for appointing mediation commissioner is too abstract in Asia.

#### **D. Foreign Investors and Alternative Dispute Resolution**

Despite economic crisis that hit Asia recently, more foreign investors, mostly the Westerners, have been committed to invest in the region during the past ten years.<sup>15</sup> This evidence shows how important Asia is to the Westerners. Due to the commercial importance of Asia, it is unarguable that Asia own a bargaining position in dealing with foreign partners.

Some Asian countries recognize forms of foreign investments in which a foreigner may invest in Asia. Types of common foreign investments are contractual joint ventures, equity joint ventures, and wholly-owned foreign enterprises. Wholly foreign-owned enterprise is enterprise that is wholly-owned by foreign investors.

A joint venture can be created by foreign investors that contract with state-owned and collectively-owned enterprises. State-owned enterprises are enterprises which come from state organs such as various ministers and commissions. Their capitals come from the central government which intended to gain financial benefit. State-owned enterprise is a separate legal entity operated by state organ.<sup>16</sup>

There are various factors which

influence foreign investors whether to make investment decisions or not. This is for example whether or not the chosen country has trustable dispute resolution system. One of the measurements is whether the chosen state is a party to a convention or treaty regarding dispute resolution mechanisms. The importance of this is to ensure that the foreign investors will have their rights well protected. This means that the foreign investors may choose a forum or mechanism that permits them to take control over how their future dispute will be resolved.

Arbitration may play some roles in influencing investment decision. This is because arbitration provides neutral forum for investors to enforce the rules of law, without involvement of the domestic court. Therefore, country targeted for foreign investment should have had good arbitration laws, arbitration institution, including its arbitrators. This means that effective alternative dispute resolution system serves as a method of fostering foreign investment. It is evident that there is link between investment levels and dispute resolution mechanisms.

Moreover, foreign investors are also interested in the enforceability of the arbitral award (decision). Therefore, the ratification of international treaty such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention) is very crucial. Such a treaty guarantees the fairness and neutrality of the forum, and therefore it promotes adherence to the rule of law. Investors are

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<sup>15</sup> George W Coombe Jr, "The Resolution of Transnational Commercial Disputes: A Perspective from North America", *Annual Survey of International and Comparative Law*, 13, 1999.

<sup>16</sup> Susan D Franck, 2007, "Foreign Direct Investment, Investment Treaty Arbitration, and The Rule of Law", *19 Pacific McGeorge Global Business & Development Law Journal* 337.

likely to become more sensitized to the benefits that treaty arbitration can offer both at the time of structuring the initial investment and dealing with problems after they arise.

Another factor is the role of domestic court system. The domestic court system provides a useful support to the integrity of the investment treaty arbitration process. This relationship plays an important role in enhancing investor confidence to make investment decision in certain country. This is because according to the New York Convention, domestic court can decide whether certain arbitral award can be enforced in that country. This depends on whether that award is contrary to the public policy of that country. The Convention states that if the domestic court decides that an award is contrary to public policy, then the award can not be enforced.<sup>17</sup>

The treaty of resolution of investment-related disputes provides a useful incentive for foreign investment. Therefore, Asian countries should continue to evaluate the possibilities and pitfalls inherent in this new form of dispute resolution to ensure that it plays a productive role in economic, legal, political and social development.

### **1. Do Asian Countries Possess Those Requirements?**

Having regard to the requirements stated above, this part of the paper will discuss if Asian ADR system has dealt with

them. This part does not include Singapore and Hong Kong in the discussion because Singapore and Hong Kong have developed enviable caseloads and reputations over the 1990s

#### **a. Adopting Model Law to National Law**

Some Asian countries have established their own ADR institution, as well as design their own ADR regimes. These efforts show an increasing awareness upon international commercial dispute settlement as a means to enhance trade and investment in Asia. India, Japan Vietnam and many other states have adopted new commercial arbitration regimes based upon the UNCITRAL Model Arbitration Law. These new laws encourage the use of international commercial conciliation and arbitration, by affording greater party autonomy and permitting less judicial intrusion in international than in domestic arbitrations.<sup>18</sup>

Although by adopting the model law has made many Asian countries have not lagged behind, there are still some difficulties in the context of arbitration. Such difficulties may be attributed to various factors which are mainly cultural, legal, institutional, educational and infrastructural.

#### **b. Ratifying Treaty**

Indonesia, China, Malaysia, Korea and many other states have ratified international convention on arbitration such as the New York Convention.<sup>19</sup> By ratifying the New York Convention, those states are bound to

<sup>17</sup> Tony Budidjaja, 2002, *Public Policy as Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards in Indonesia*, PT Tatanusa, Jakarta.

<sup>18</sup> George W Coombe Jr, *Loc. Cit.*

<sup>19</sup> Lisa Blomgren Bingham, 2007, "Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution", *19 Pacific MCGeorge Global Business & Development Law Journal* 37.

enforce arbitral award made overseas, as long as the state where the award is made is also party to the New York Convention. In return, arbitral award made in those states are enforceable in any other state in which they are party to the Convention.

The New York Convention meets need of international commercial arbitration namely: party autonomy of parties to international commercial transactions to design dispute resolution procedures and mechanisms unconstrained by the peculiarities of national laws and practices, and, the assurance that arbitral awards rendered pursuant to those procedures and mechanisms will be reliably recognized and enforced in virtually all of the world's major trading nations.<sup>20</sup>

Even though some steps to modernize ADR legislation and institutions have been taken, dispute settlement still often face some problems in some Asian countries. This is for example the failure of some New York-Convention-signatory state's to ratify the Convention by way of an enabling legislation. The unavailability of a mechanism or guidance for courts for the implementation of foreign arbitral awards becomes the common reason.<sup>21</sup>

This condition serves as an evident that a mere modernization of international ADR laws does not necessarily make Asia become an attractive venue to settle transborder commercial disputes. As a consequence, foreign business partners of Indonesia, Japan, Vietnam, Thailand and Malaysia still prefer to settle their disputes outside those

countries.

In order to overcome those situations, some development should be made such as: a proper infrastructure in terms of educated, trained and experienced ADR professionals, as well as specialist judges. Those professionals need to understand culture in which the dispute exists. Unfortunately, many Asian countries are still lagging behind in these respects. Moreover, most foreign investors do not take into account Asian cultures in doing business as well as settling dispute with their Asian counterparts. As a result, the dispute are escalating, the business relationship ruined and the settlement cannot be achieved.

Having knowledge and awareness of states' culture in the international business community will reap excellent benefits. Without the enlightenment of its cultures no community can expect progress and prosperity from any cross-border commercial activities. On the other hand, without the establishment of sound dispute settlement mechanisms which meets international standard, no confidence of the international business community can be expected. As a consequence, the prospect of the economic development of a country, especially developing country, cannot be achieved.

#### **E. Develop Culturally Conscious Dispute Resolution to Improve Asian ADR**

Asian countries need to improve their ADR system if they are willing to settle their disputes with foreign business partners in

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<sup>20</sup> Shin-yi Peng, *Op. Cit.*

<sup>21</sup> Maniruzzaman AFM, *Op. Cit.*

their own countries. Despite the effort from Asian countries themselves by modernizing the ADR legislation and ratifying treaties, the foreign investors should understand culture where the business take place as well as where the dispute exist and being resolved. Those mutual efforts would yield mutual benefit for both of the parties.

### **1. What is Culturally Conscious Dispute Resolution**

Culture is understood as “a set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, and other groups and orient their behavior”.<sup>22</sup> Understanding culture when dealing with dispute is very important as high percentage of prospective cross-border deals fail because of the inability of the negotiators or mediators to work and to communicate successfully across the cross-cultural barrier.<sup>23</sup> It is therefore, undebatable that foreign parties dealing with Asians need to understand Confucianism in China, Korea, Japan as well as *musyawarah* in Malaysia, Indonesia and also the role of *panchayat* in India.

With the adoption of the UNCITRAL Model Law and signing up for the New York and ICSID Conventions, the Asian countries seem to have gone a long way from their own traditions of informal dispute settlement to enter formal western norms and values. However, it should be noted that, in fact, many Asian countries still stick to their traditional values in the matter of dispute settlement.<sup>24</sup>

Alternative dispute resolution practitioners do not only need to know international rules on dispute resolution, but also need to understand and pay regard to the culture where the parties come from and where the dispute is going to be resolved. Merely knowing international rules will be helpful to seek the resolution. However, without understanding the local legal culture, the resolution process and its outcome might not produce the ultimate benefit. Every dispute resolution practitioners must realized that there is no legal culture operate in the same manner between a state to another. Therefore, the practitioners need to study how conflicts are defined, understood, treated and resolved in various legal cultures. Once local legal culture is understood, a successful dispute resolution program which is efficient and effective to the community is about to begin.

By analyzing the cultural differences among parties of a dispute, the commonalities that the parties have will become clearer. As a result, the dispute resolution practitioners who involved in settling the dispute will discover common ground on which they can build even stronger ADR structures to obtain the best resolution for both parties. The advantage of alternative dispute resolution in a cultural context is that it examines the interests underlying the parties' positions in order to evaluate the needs, concerns, and desires of each side.

<sup>22</sup> David F. Day, “International ADR Skills and Executive Decision-Making”, *Hawaii Bar Journal* 5, 2005.

<sup>23</sup> *Ibid.*

<sup>24</sup> Maniruzzaman AFM, *Loc. Cit.*

## **2. In What Aspects Asian and Westerner Differ**

For Asian, business activities with their partners are seen as a social relationship, while Westerners see it as a legal relationship. The effect is, in drafting a contract, for Asians, indistinguishable language is often necessary to ensure consensus on sensitive issues. Ambiguity is viewed as a useful device in justifying conflict and building common positions and confidence. However, for Westerners, ambiguity is considered as a reflection of weaknesses. Ambiguity can be used as a weapon for Westerners to attack the opposite party. Asians prefer flexibility, but Westerners prefer concrete agreements. Westerners tend to focus on procedures and regard disputes and negotiations as natural, inevitable, and even productive or beneficial. Asians tend to avoid legalism and emphasize group “harmony” and consensus.<sup>25</sup>

Avoiding formal and legalistic procedures are dominant legal culture in Asia. Every dispute is going to be discussed together, and consensus is considered as the ultimate outcome. Asians do not like confrontation and threaten the other party of the dispute. Therefore winning the case is not the ultimate objective. Rather, consensus and maintaining business relationship are the top priorities. As a result, mediation and conciliation have been preferred compare to arbitration because they promotes consensus and therefore provide opportunity to continue the commercial relationship.<sup>26</sup>

Western business partners on the other hand, own absolutely different principles. For example, the American approach is “to start with legally binding commitments covering a wide range of issues.”<sup>27</sup> Adversarial method on the form of legal battle is commonly accepted. The main objective of this method is winning the case and get the legal right back. This is no matter that consequence is an ending of the business relationship.

Relationship with their business partners makes privacy an essential aspect of Asian commercial dispute resolution traditions. Even though privacy is also important for Westerners, it is valued more in Asia.<sup>28</sup> Publicly stated a dispute can be regarded as a war. It is believed to be a mistake to publicly show a dispute, as it is considered as an attack to individual’s dignity.

A question might arise on what happen if the foreign business partners do not take Asian culture into account. Many Asian businesspersons obviously are aware of Westerners’ business practices. In addition, they also understand what their business counterparts expect in regard to the role of law and contracts.<sup>29</sup> However, it does not necessarily mean that Asians accept Western business practices and expectations completely without any exceptions. This means that the commercial practice and expectations of Western, in some extent, should be conformed to Asian practices and expectations.

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<sup>25</sup> Shin-yi Peng, *Loc. Cit.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Maniruzzaman AFM, *Loc. Cit.*

<sup>29</sup> Philip Jc Macghounny, *Loc. Cit.*

Asian countries have modernized and adapted their ADR legislation in order to meet international standards. In exchange, Asia deserves dispute resolution mechanisms different from that of the Western model. Asian commercial disputes require complete privacy and confidentiality, elastic notions of relevance and evidence, inexact and flexible rules of procedure, significant presentational latitude and variance, as well as predictability.

The precise alternative dispute resolution paradigms that emerge from attempts to accommodate Asian and Western needs will vary according to the circumstances of each transaction and industry. Moreover, willingness of commercial parties to explore possibility to match differences between legal certainty and business continuity is also taken into account. Therefore, procedural adjustments are inevitable to achieve mutual understanding.

## **F. Conclusion**

Asia has great potential to develop ADR industry. This is not only because of Asian tradition belief that cause Asians are generally reluctant to litigate their disputes to court, but also because of its growing number of foreign investors and its rapid economic growth.

In a business transaction, even though avoidance of disputes is always main concern, it is important to prepare methods of dispute resolution which are efficient and economical. In a commercial contract, the method used to resolve disputes should have the goal of reaching agreements between the disputing parties to terminate the dispute through a mutual concession. This is

because further relationship between traders or business players are the most important to preserve. Self-determination and party autonomy in Negotiation and Mediation gives opportunity to disputing parties to make their own choices on what they will agree on. It gives chances to negotiate between the parties to satisfy their interests, create some options which can lead to an outcome of the disputes.

Despite efforts that have been done by Asian countries to improve the ADR system by modernizing their ADR legislation, ADR in Asia is still facing some shortcomings. This is because some of ADR practitioners and foreign business players do not consider Asian cultures and values when dealing with Asians.

Transnational business disputes usually exist within the context of complex, long-term, and often multiparty relationships. Typical examples of such relationships include: joint ventures between two or more transnational entities to establish research and development), marketing, or manufacturing facilities in a third country; joint ventures between private investors and state-owned enterprises for large-scale industrial and agribusiness developments in developing countries the complexity of transnational commercial transactions reflects a willingness of parties to create and sustain a long-term comprehensive endeavor in the expectation of mutual economic benefit. Indeed, avoidance of confrontational, adversarial dispute settlement is a must to be able to maintain those business relationships.

Unenforceability of ADR decision is truly a serious problem. Many of the

problems are in Asian culture itself, but it is highly likely that such cultural problems can be avoided if international commercial mediation or arbitration can be tuned in to cultural needs and expectations. When parties (especially the loser) to a dispute

realize that the settlement reached is based on their cultures and perspectives, it is highly likely that they will voluntarily accept the settlement. The reason is, the losing party is sure that the process has been done “fairly” by considering the needs and expectations.

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